

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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JONATHAN ODOM,

Plaintiff,

**DECISION  
And  
ORDER**

BRIAN BAKER, et al.,

Defendants.

**02-CV-757F**  
(Consent)

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By papers filed July 13, 2006, Defendant Stoerr and non-party Kenneth Berbary move to dismiss the Complaint on various grounds (Doc. No. 38) (“Defendants’ Motion”). By order filed July 21, 2006, Plaintiff’s Response to Defendants’ motion was due August 18, 2006; Defendants’ reply was due August 31, 2006. On July 31, 2006, Plaintiff requested additional time within which to file his response. By order filed August 4, 2006, Plaintiff was given until September 15, 2006 to file his response (Doc. No. 39). By letter, dated August 9, 2006 (Doc. No. 41), Plaintiff informed the court he was unable to comply with the court’s July 21, 2006 order; however, no mention was made of the court’s August 4, 2006 order extending the time for Plaintiff’s response.

Additionally, in his August 9<sup>th</sup> letter, Plaintiff sought to “preserve” his right to file a proposed amended complaint, a copy of which was attached to the letter along with an affidavit in which Plaintiff contends this court’s earlier order of March 31, 2006 (Doc. No. 33) incorrectly dismissed as moot Plaintiff’s earlier motion to file an amended complaint for the stated reason that the original complaint had not been served. (Decision and Order dated March 31, 2006) (Doc. No. 33). Nevertheless, to move the case forward, in that order the court directed service of the Complaint upon Defendants by the U.S.

Marshal Service. According to the docket, to date, service was effected upon Berbary, a non-party, and Stoerr only.

In these circumstances, Plaintiff's request for permission to "preserve" his right to file an amended complaint is moot. As the Complaint has now been served and as no answer has been filed by Berbary and Defendant Stoerr or the remaining named but unserved Defendants, Plaintiff may proceed to file and serve an amended complaint as of right. See *Harrison v. Federal Pacific Credit, LLC.*, 2006 WL 276605 \*2 (W.D.N.Y. Fed. 2, 2006) (motion to dismiss not a responsive pleading for purposes of Fed.R.Civ.P. 15(a)). Consistent with this court's direction, as stated in its earlier March 31, 2006 Decision and Order, Plaintiff's proposed amended complaint, attached to his August 9, 2006 letter is herewith approved for filing, and such Amended Complaint shall be served upon each named Defendant by the U.S. Marshal Service pursuant to Fed.R.Civ.P. 4(c)(2) within 30 days of this Decision and Order.

Should Plaintiff believe he requires additional time within which to file any response to Defendants Berbary's and Stoerr's motion, Plaintiff shall file a motion requesting such relief together with an affidavit stating the basis for such request within 10 days of service of this order. The Clerk shall provide a copy of this Decision and Order to the local office of the U.S. Marshal Service together with a copy of the Amended Complaint.

SO ORDERED.

/s/ Leslie G. Foschio

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LESLIE G. FOSCHIO  
UNITED STATES MAGISTRATE JUDGE

Dated: August 31, 2006  
Buffalo, New York